IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-779

DRYWALL TAPERS AND POINTERS OF GREATER NEW YORK, LOCAL 1974, *et al.*,
Petitioners,

v.

OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, OPERATIVE PLASTERERS LOCAL 60, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION [1]

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Petitioner and respondent labor organizations are contractually bound to resolve work jurisdictional disputes between them in accordance with the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry established under the Constitution of the AFL-CIO's Building and Construction Trades Department. A

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[1] Throughout this Brief the following abbreviations will be used: "Pet." will refer to the Petition for Certiorari; the opinions of the Court of Appeals and the District Court will be cited to the Appendix to the Petition (*e.g.*, "Pet. 8a.") "J.A." will refer to the Joint Appendix in the Court of Appeals in this case.

Hearings Panel, the highest tribunal established under that Plan, after hearing both unions and the respective affected employers of their members, rendered an award allocating the work in question and allowed no damages to petitioners.

The question presented is whether the two courts below erred in determining that the Panel acted within its authority under the Plan and that its award foreclosed any claim by petitioners for damages arising out of the dispute.

COUNTERSTATEMENT OF THE CASE

A. The Final and Binding Plan Under Which the Challenged Award Was Rendered

The Petition for Certiorari asks this Court for further review of an arbitration award which has already been approved by the District Court and by a unanimous Court of Appeals. The award resolved a work jurisdictional dispute between the union petitioner, a New York City local union affiliated with the International Brotherhood of Painters and Allied Trades ("Painters International"), and the respondent New York City locals affiliated with the Operative Plasters' and Cement Masons' International Association ("Pasterers' International").[2] The award was rendered by a Hearings Panel established under the "Plan for the Settlement of Jurisdictional Disputes in the Construction Industry" (the "Plan"). Because the Painters International and the Plasterers' International are members of the Building and Construction Trades Department of the AFL-CIO (the "Department") the local unions are required, under Article X of the Department's Constitution, to resolve jurisdictional disputes between them in accordance with the Plan. Article X expressly declares:

> *Said present plan or any other plan adopted in the future shall be recognized as final and binding upon the Department and upon all affiliated National or International Unions and their affiliated Local Unions.* (Pet. 8a, n.3, Court's emphasis.)

[2] The Plasterers International was also named a defendant and is a respondent.

Article VII, Section 2, of the Plan states:

> (a) The Department and each of its affiliated Unions agree that all cases, disputes or controversies involving jurisdictional disputes and assignments of work arising hereunder shall be resolved as provided herein and shall comply with the decisions and awards of the Board, or Hearings Panel established hereunder. (Pet. 8a, n.4.)

And Article VII, Section 2(h), states:

> (h) It is further agreed that, if the parties hereto comply with all of the provisions of this Agreement relating to Article VIII, they shall be relieved of all other liability arising therefrom . . . (*id.*)

The Plan establishes three separate bodies. The first, vested with overall responsibility for administration of the Plan, is the Joint Administrative Committee (the "JAC"), composed of four labor representatives chosen from the Department and four management representatives chosen from the signatory employer associations (J.A. 63). The second body is the Impartial Jurisdictional Disputes Board (the "Disputes Board"), whose three members are selected by the Joint Administrative Committee (J.A. 63). The third and final body contemplated by the Plan is the Hearings Panel, which may be convened specially from time to time to decide particular disputes, composed of two union general presidents appointed by the Department and two employer representatives selected by the signatory employer associations and chaired by an Impartial Umpire appointed by the JAC (J.A. 70).

Article IX of the Plan provides that if a jurisdictional dispute arises in a locale where there is in existence a local board of construction industry union and employer representatives recognized by the Plan, the dispute shall first be submitted to that local board (J.A. 70). The

local board's decision may then be appealed to the Disputes Board, which may also hear any dispute in the first instance where no local board exists. Above the Disputes Board in the Plan's hierarchy is the Hearings Panel, which may hear cases referred to it by the JAC or the Disputes Board itself (J.A. 70). There is no further appeal from such a decision of a Hearings Panel; thus, in the District Court's words, the Hearings Panel is the "highest god" in the labor movement for deciding jurisdictional disputes among construction unions. (J.A. 505).

B. The Instant Jurisdictional Dispute and the Proceedings to Resolve It

1. In March, 1975, the Painters local requested arbitration before New York City's local board of its dispute with Plasterers over use of "Sta-Smooth" in pointing and taping of drywall. At the hearings before the local board, the Plasterers argued they were entitled to the work by virtue of a "Decision of Record" issued by the Department in 1947; the Painters argued the work was theirs under a 1961 "Memorandum of Understanding," to which Painters and Plasterers were parties. The New York City board ruled for the Plasterers (Pet. 4a-5a). The Painters appealed to the Disputes Board. Contrary to what is incorrectly asserted at Pet. 6, the Disputes Board did not refuse to hear the case because of any "1973 directive." The Disputes Board expressly agreed in July, 1975, to hear the case, but ultimately refused after the Painters ignored the Board's repeated requests to drop efforts to establish their right to the work through other private arbitration proceedings to which the Plasterers were not a party (Pet. 5a). For obvious reasons, such unilateral efforts to establish jurisdiction are forbidden under the rules of the Plan. (J.A. 92a).

2. Subsequently, petitioners filed this action, seeking, among other things, damages for alleged breach of the

1961 Memorandum of Understanding. At the same time, they requested a preliminary injunction restraining Plasterers from asserting jurisdiction over the work in question. In originally denying the request for an injunction, the Court directed the parties to request the JAC to convene a Hearings Panel to resolve the recurring pointing and taping issue. (J.A. 308a).[3] Such an injunction was ultimately granted because, as the Court subsequently explained, it perceived a "breakdown" in the procedures required to resolve the controversy under the Plan (Pet. 15a).

3. A Hearings Panel to resolve the dispute was ultimately established, and two separate hearings were held at which the present parties and employers of their members were heard. The instant dispute was only one of many which had occurred over the years throughout the country between painters and plasterers regarding pointing and taping of drywall surfaces (Pet. 4a). On March 1, 1978, the Panel issued its decision. Rejecting the respective contentions of both parties, it held that there was no inconsistency between the 1947 Decision of Record and the 1961 Memorandum of Understanding and that neither document exclusively controlled assignment of the work. The 1961 Memorandum, the Panel held, was an attempt to clarify the 1947 Decision in the light of intervening technological changes (Pet. 6a). It allocated the pointing and taping of drywall between the Painters and the Plasterers on the basis of whether the drywall surfaces are, or are not, to receive plaster, acoustical or imitation acoustical finishes.[4]

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[3] The District Court's decision granting the request for an injunction is not reproduced in the Petition, but appears at J.A. 371a. On respondents' appeal, the Court of Appeals affirmed the injunction against the Plasterers' claiming the work, but limited it to the New York City area. (Pet. 19a-32a).

[4] The Hearings Panel decision on the pointing and taping of drywall held:

[Footnote continued on page 6]

Intending its decision to bring the longstanding controversy over pointing and taping to an end, the Hearings Panel held also that its decision "supercede[d] and render[ed] moot all controversies arising out of past assignments" and that it "contain[ed] full and final relief for all claims, both past and present, of all persons affected by this controversy and no further relief whatsoever is warranted" (Pet. 6a).

4. Shortly thereafter, respondents moved to dismiss the complaint and dissolve the preliminary injunction, arguing that the Panel's decision had completely resolved the controversy. While petitioners readily accepted the Hearings Panel's award as a determination in their favor of the jurisdictional dispute which had given rise to this action, they opposed respondents' Motion on the theory that the Panel had exceeded its authority by declaring all past claims moot and denying further relief. The District Court rejected petitoiners' argument as "clearly contrary" to the Plan. The District Court found that the Panel had the authority to dispose of the dispute as it had and that its decision was binding on the parties (Pet. 13a-16a). On petitioners' Motion for Reargument the District Court reaffirmed its decision (Pet. 17a-18a).

The Court of Appeals for the Second Circuit unanimously affirmed the District Court's decision. A petition for rehearing and for rehearing *en banc* brought by the petitioners was denied without dissent.

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[4] [Continued]

(1) All pointing and taping, regardless of material used, is painters' work, provided the drywall surfaces are not to receive plaster, acoustical or imitation acoustical finishes.

(2) Pointing and taping, regardless of material used, of drywall surfaces which are to receive plaster, acoustical or imitation acoustical finishes shall be the work of plasterers.

(3) The surface produced by the application of the same plaster pointing material as used in the pointing and taping of the joints to the entire drywall surface for the purpose of producing a uniform surface compatible with the pointed and taped joints shall be considered a plaster finish, and the pointing and taping in connection therewith shall be the work of plasterers.

REASONS FOR DENYING THE WRIT

1. Petitioners' contention that the decision below "is in conflict with this Court's decisions in the *Steelworkers* Trilogy" (Pet. 10)[5] rests on a false description of that court's reasoning. Petitioners assert that the court below "implicitly acknowledged the Panel's excess of authority but held that judicial approval thereof is mandated by the national labor policy." But the court neither said nor implied that the Hearings Panel lacked jurisdiction. Petitioners' implication rests entirely on a truncated version of a sentence from the court's opinion which begins as follows: "We find that, notwithstanding the long delays and the maladministration of the Plan, . . ." (Pet. 8a). Thus, the court did not acknowledge any lack of jurisdiction in the Hearings Panel, but only that that jurisdiction had not been exercised with appropriate dispatch. Even more significantly, in the sentence immediately following that from which petitioners quote, the court made plain that it well understood its responsibility:

> In so doing we are not unmindful of our obligation to give "meaningful" judicial review to the questions of whether an arbitral panel exceeded its authority; [citing the *Steelworkers* Trilogy]; but we also note that the function of the court is very limited when the parties, as in the present controversy, have agreed to submit questions of contract interpretation to an arbitrator or Hearings Panel, as the case may be. (Pet. 8a-9a.)

Petitioners do not deny that this is a correct statement of the role of the courts as established in the Trilogy and its progeny. Thus, the controversy between the parties boils down to the question whether the courts below erred in applying that standard when they reviewed this particular decision of the Hearings Panel. And that question is not conceivably of sufficient general

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[5] The cases are: *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564; *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574; *Steelworkers* v. *Enterprise Mfg. Co.*, 363 U.S. 593.

significance to warrant the attention of this Court, but is strictly limited to the facts of this particular case. To be sure, petitioners do strain to endow this case with importance by resort to the *ipse dixit* that there has been a "substantial increase, in recent years, of union jurisdictional disputes, especially in the construction industry." (Pet. 14.) Even if this wholly unsupported assertion were correct, and we do not know it to be so, peittioners' position would not be advanced. For it is petitioners' position which would, if sustained, exacerbate industrial strife by undermining the method which the construction industry unions have adopted for avoiding and peacefully resolving jurisdictional disputes.[6] The expectation of finality, subject to only limited judicial review, is, as this Court has recognized since the *Steel-*

[6] Petitioners argue that the "national policy favoring submission of union jurisdictional disputes to arbitration derives not from [§ 203(d) of the LMRA, 29 U.S.C.] § 173(d) but from § 10(k) of the National Labor Relations Act as amended" (Pet. 13) and argue further that the standards under these provisions differ materially. Since none of the questions presented in the petition raises the issue whether the court below erred in holding that § 203(d) was applicable, this argument is evidently an afterthought. It is wholly devoid of merit, if not actually self-defeating. The proposed distinction between "final adjustment" in § 203(d) and "voluntary adjustment" in § 10(k) is even facially plausible only until it is remembered that § 203(d) encourages "final adjustment *by a method agreed upon by the parties*" (our emphasis), which, of course, means a voluntary method. Sections 203(d) and 10(k) are not mutually exclusive, as petitioners would have it, but embody a single policy which prefers the resolutions of voluntary private tribunals to those of the courts and other government agencies. This is illustrated by the very case which petitioners cite, *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, which relied on the policy of § 10(k) as well as that of § 203(d) in directing an employer to arbitrate under a contractual grievance procedure a controversy which the court assumed (in that portion of its decision) was a jurisdictional dispute which would be subject to § 10(k). Compare *id.* at 264, n.3 (quoting § 10(k)) with *id.* at n.4 (quoting § 203(d)). And the notion that § 10(k) envisions broader review of awards than that accorded under § 203(d) is wholly baseless. Indeed, when the parties to a jurisdictional dispute agreed to such a method of adjustment, the NLRB, to which § 10(k) is addressed, is absolutely foreclosed from determining the dispute, it is not empowered to provide even limited review.

workers Trilogy, a vital part of the bargain when parties agree to submit their controversies to private arbitration as a substitute for economic action.[7]

Even as this Court does not ordinarily grant certiorari to determine whether a court of appeals properly applied the statutory standard of review of decisions of administrative agencies (*Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 491), so certiorari should be denied where, as here, the only issue raised is whether a court of appeals correctly assessed an arbitration award when that court plainly and explicitly followed the standards laid down by this Court. These considerations militate even more strongly against review here, since the Court of Appeals' assessment of the record affirmed that of the District Court (*cf. United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2, and cases cited *id.*—"two-court rule").[8]

[7] See particularly *Enterprise Mfg. Co., supra*, 363 U.S. at 599.

[8] In thus stressing that the correctness of the Hearings Panel's decision is not an issue which qualifies this Court's consideration, we do not wish to leave the impression that that decision was even arguably wrong. On the contrary, petitioners' basic contention that the Panel was confined by the terms of petitioners' "submission" (see the phrasing of each of the questions presented, Pet. 3) is factually inaccurate and legally frivolous. The "submission" here was by direction of the District Court to both parties, see p. 5, *supra*, and was in no wise limited. Nor were petitioners free to exclude any issues from the arbitration, since as parties to the Plan they were contractually bound to resolve "all cases, disputes or controversies involving jurisdictional disputes and assignments of work" under the Plan. Moreover, it frequently happens that both sides to a litigation take extreme positions, either for strategic reasons or because they are blinded by their own partisan perspective from perceiving intermediate positions. Arbitrators could not perform their function, any more than could the courts, if they were impelled to choose one or the other extreme. Thus, as the court below said:

> . . . arbitral bodies or Hearings Panels, when attempting to do justice and to reach workable solutions, do not *a fortiori* exceed their authority because they take cognizance of issues beyond those presented by the parties. (Pet. 9a.)

2. As an additional ground for sustaining the decision of the Hearings Panel the Court of Appeals relied on the principle "articulated in *English* v. *Cunningham*, 283 F.2d 848, 850 (D.C. Cir. 1960), that 'courts will accept the correctness of an interpretation fairly placed on union rules by the union's authorized officials.'" (Pet. 9a) Again, petitioners do not disagree with the principle (which has been approved by other courts of appeals as well, see Pet. 9a-10a), but assert only that it was "misapplied" in the present case (Pet. 14-16). But again, that contention raises no issue "of importance to the public as distinguished from that of the parties * * *" (*Labor Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 520, *quoting from Layne & Bowler Corp.* v. *Western Well Works*, 261 U.S. 387, 393), and therefore does not warrant review.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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